

ZONING BOARD OF ADJUSTMENT

MINUTES

NOVEMBER 16, 2011

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, November 16, 2011 at the Conway Town Office in Center Conway, NH, beginning at 7:35 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Dana Hysten; Sheila Duane; Planning Director, Thomas Irving; and Executive Secretary, Karen Hollowell.

There were approximately 22 members of the public present. Also, present were Town Manager, Earl Sires, Assistant Assessor, Dale Scholfield, Building Inspector, David Pandora, Code Compliance Officer, Jim Yeager, Conway Village Fire Chief & Town Emergency Management Director, Stephen Solomon, Town Attorney, Peter Malia, FEMA Representative, Ivy Frances, and Office of Energy and Planning (OEP) Representative, Susan Slack.

APPOINTMENT OF ALTERNATE MEMBER

Newly appointed ZBA Alternate, Luigi Bartolomeo, was present; however, did not participate in the meeting as he had not yet been sworn into the position.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **SHAWN AND KRISTIN JARVI** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** at 348 Transvale Road, Conway (PID 251-72). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Thursday, November 3, 2011.

Mr. Irving read aloud an email received from the Jarvi's advising they are unable to attend today due to a friend's passing. Mr. Irving stated that he advised the Jarvi's that either they or someone else can appear for them or they can request a postponement to the December or January meeting of the ZBA. Mr. Irving advised that there are already eight applications scheduled for the December meeting and asked that it be rescheduled for January 18, 2012. **John Colbath moved, seconded by Sheila Duane, that the hearing for Shawn and Kristin Jarvi be continued until the 18th of January 2012 at 7:30 p.m. The motion carried unanimously.**

A public hearing was opened at 7:37 pm to consider a **VARIANCE** requested by **DONALD AND SUSAN MORSE** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** on Beach Way, Conway (PID 251-59). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Thursday, November 3, 2011.

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Donald Morse appeared before the Board. Mr. Irving advised that due to a noticing defect, the public hearing notice did not get published in the Conway Daily Sun until yesterday, November 15, 2011 instead of last week; however, all other noticing requirements have been satisfied. Town Attorney, Peter Malia, advised the notices were sufficient, unless any applicants have an objection. Ms. Sherman asked the applicants, Donald and Susan Morse, if they had any problems with this issue and the applicants advised they did not have any problem.

Donald Morse advised that he has a small structure with a roof on his property. They need something to stay out of the rain. When they bought the place five or six years ago, he redid all of the buildings on the property. Mr. Morse stated that if the town would like to send the Building Inspector to look at the structures they can. Mr. Morse next advised he didn't get any paperwork to do any of the work because he didn't think he needed any. Ms. Sherman questioned if the applicant made any inquiries to the Town as to what was needed. Mr. Morse stated no and that everyone else had the same things on their property. He tore down what was there and rebuilt it. Ms. Sherman questioned if this is a structure only or if it is on concrete. The Applicant advised it is concrete and it is lagged down. Mr. Morse advised he has pictures of the structure after the storm and it is still there. Ms. Sherman questioned the size of the structure. The applicant advised it is 12' x 20' but sturdy. The Applicant next stated that he does know that it floods down there. Ms. Sherman questioned when the Applicant purchased the property. The Applicant advised 2005. Ms. Sherman questioned if there was anything there on the property. The Applicant advised there was a shed and lean-to. Ms. Sherman questioned if there was a slab. The Applicant replied in the affirmative and added that he ripped down the old structure and put a new structure on the existing slab without a permit. Someone told him if building something under \$1,500, then you do not need a permit. Ms. Sherman questioned if anyone told him there were different requirements for floodway or floodplain. The Applicant responded in the negative and added that he has been going there since he was a kid and there are 30 or so structures down there. Ms. Sherman questioned –other than word of mouth, you did nothing to find out if you needed permission from the Town. The applicant advised he did not and if he did he would have gotten a permit.

Ms. Sherman asked for questions from the Board. John Colbath questioned if this property is in the floodplain. Ms. Sherman advised it is in the floodway. Mr. Morse added that he is right on the beach.

Attorney Malia stated the Board will receive comments pertinent to this application and the three that follow this evening. In addition to the variance you apply there are others that the Board will need to apply as well and they are listed on the last page of the Board's worksheet. There are three additional variances the Board will need to vote on that they don't usually need to vote on. Attorney Malia next advised that FEMA and OEP representatives are present at the meeting this evening and can help with the rules and regulations. Attorney Malia next advised the Town does participate in the National Flood Insurance Program and that FEMA will suspend the Town from the National Flood Insurance Program if the Town does not comply with requirements. Attorney Malia next advised that many of the cases that will be heard by the Board are for work

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that was done many years ago but not before 1979 as that is when the floodplain ordinance was put into effect. If something was built earlier than 1979 then it might be grandfathered.

Ms. Sherman next asked for additional questions from the Board. Mr. Colbath asked if there is a property history. Mr. Irving responded in the affirmative advising it was developed by town staff based on records at Town Hall. The Applicant advised he did not have this information. Mr. Irving advised that it is public record and available at Town Hall. Jim Yeager advised that the document the Board has today was compiled after the Applicant filed the variance.

Andy Chalmers questioned if the town sent violation notices previously on the properties. Mr. Irving advised that we did not go out and review the properties before the storm. There was no reason for town staff to go and look over each property. We weren't compelled to go out there to check the status of each property.

A member of the audience, Michelle Knowles, stated that the town was aware of what was there and this was documented on tax bills, maps, etc. Ms. Knowles stated they purchased their property in 1997 and feel they are being punished now because the town didn't do their job. Now, since the hurricane, the Town is trying to enforce Town and FEMA regulations and she feels they are being punished because the town didn't do their job previously and she would not have bought her property.

The applicant, Donald Morse, stated if it wasn't for having to rescue twenty two people that day we wouldn't be here now. Ms. Sherman advised there has been rescue after rescue in the area for years. Skip Groves stated that he felt that most who wanted rescue wanted a hotel room for the night. Susan Blaney stated she lives in Transvale full time. Ninety-two percent of those rescues were made from the top and the rest were taken from the middle area of Transvale. Ms. Blaney next stated that she was there through the whole flood and, also, she can attest that most buildings have been there since the 1970's. Andy Chalmers asked Chief Solomon what kind of rescue efforts have been going on. Chief Solomon advised that he has been here for four years and this was his first time to make a rescue by boat, however, they have had calls every year for rescue. Also they did have to pull people out by boat in the past. Ms. Sherman stated that this information may not be material to the case at hand. What is material is that the structure and the slab on the property was not constructed pursuant to town code. Ms. Sherman next stated that in this case someone had a travel trailer before the water rose and what we are talking about is the canopy and slab that got put in sometime between June of 2004 and October of 2005.

Clifford Haley advised he is from the West Side. Mr. Haley questioned when people start talking about grandfathering –is it up to the town or the people to prove or can we just hear from the people that it existed. Ms. Sherman stated the landowner has to prove the legal existence of approved upgrades to the property. The applicant has to prove something was legally in existence.

Ms. Sherman next advised in the case at hand in 1994 this was assessed as a vacant lot. In 2004 there were no structures on the property. The Floodplain Overlay District went into effect in 1979. Anything that occurred after needed a permit and apparently there was no permit. In

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2005 the Applicant purchased the property and yet there was a slab and structure there. So this was an illegal structure and illegal slab.

The Applicant, Mr. Morse, next questioned -can you fine me and let me keep the building. It was well built and you (the town) can just send the building inspector down there to look at it. Ms. Sherman asked Mr. Pandora to comment. Mr. Pandora stated that whether the structure is sound or not is irrelevant if there is no permit to build it.

Ms. Sherman asked for further questions or comments. Ivy Frances from FEMA stated there should be no encroachments in the floodway.

Don Sullivan questioned if he bought a piece of property with a slab and pavilion and now five years later would he would have to pull a permit or have the building inspector come and look at the structure. Mr. Pandora stated if you could prove it was there legally you could get a permit. Mr. Sires stated the issue of having a permit is only relevant if you are grandfathered.

John Colbath stated there is caveat emptor which means the buyer must beware if what they are buying is legal or not. If it was illegal and someone bought it -it doesn't make it legal.

The Applicant, Mr. Morse, next stated that these structures have been down there since he was 15 years old. If the town knew they were down there why didn't they do something then. Ms. Sherman pointed out that the records show there was nothing on the property in 2003 and you are saying there was now. Mr. Morse stated yes, there were old junk structures there. Ms. Sherman reviewed that whatever was done in 2004 was illegal.

Attorney Malia stated that whatever was put there after 1979 -it was put there illegally. Now, since the storm, things have come to FEMA and the Town's attention and we must address the issues. Mr. Malia next added that it is private property in Tranvale and the town had a limited amount of access to the area. Now, as a result of the storm, we have become aware of the issues and they have to be addressed -both by the Town and FEMA.

Paul Pellerin stated that -you say the town didn't know, but every six month when tax bills went out they knew. They have been paying taxes on the structures every six months -isn't the town liable too? Attorney Malia advised the Assessor's office collects information on properties yearly. He doesn't think the Assessor forwards everything to the Building Inspector on every shed. Just because something shows up on the assessing card doesn't make it legal. Paul Pellerin stated if a building is on a tax map -doesn't that mean someone measured them?

Bruce Duggan stated his mother has been going to the area since 1968. Are you saying this went into effect in 1979 and did something go out to the people that this went into effect? Sheila Duane explained this went before the voters.

Bruce Duggan stated they have proof that his mother's structures were there. He has pictures but was still denied and the Town says they have to come before the Board. Mr. Duggan questioned

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why he has to do this if he has proof. Mr. Irving requested to the Chair, Ms. Sherman, that this Board wait to see the information on the matter first. Ms. Sherman agreed.

Kelly LeBlanc stated she is speaking on behalf of her mother Marsha Duggan and the property is located on the lower part of Transvale Road. She thinks that the people need clarification of information needed for grandfathered status. When is deemed legal proof. Mr. Irving stated there is no grandfathering issue on the property that is being discussed at present (Mr. Morse's property). The other information is available to the public and the town can supply this information to anyone who needs it; however, it doesn't apply to the application presently before this Board.

Clifford Haley stated he thinks it is ridiculous that people say they didn't/don't know about zoning. All towns have zoning.

Sheila Duane requested that the discussion get back to the application that is now before us and Ms. Sherman agreed. Ms. Sherman asked for any further questions. There were none. Ms. Sherman closed the public hearing at 8:09 p.m.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment. Mr. Chalmers stated he will vote no as it is contrary to public interest to allow the structure in the floodway. Mr. Colbath agreed with Mr. Chalmers and added that it is also against FEMA regulations. **The motion failed unanimously.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Duane, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment. Ms. Duane advised she will vote no as the ordinance is designed to protect the floodway. **The Motion failed unanimously.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that substantial justice is done.** Ms. Sherman asked for Board comment. Mr. Chalmers advised he will vote no as substantial justice would not be done because the benefit to the applicant was outweighed by the harm to the community. Mr. Colbath agreed for the same reason. **Motion failed unanimously.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Duane, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment. There were no comments. **Motion carried unanimously 5-0-0.** Mr. Irving noted that should the other property owners in the floodplain no longer be eligible for National Flood Insurance at reduced rates this would be an impact on other properties.

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Ms. Duane, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** Ms. Sherman asked for Board comment. Mr. Colbath advised he would vote no as the substantial

relationship is this is in the floodway and it is in the public interest to not have structures that can be uprooted. **Motion failed unanimously.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Ms. Duane, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment. Mr. Colbath advised he would vote no as the floodway is not a place to build structures. **Motion failed 1-4-0 with Mr. Hylen voting in the affirmative and Mses. Duane and Sherman and Messrs. Colbath and Chalmers voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Ms. Sherman asked for Board comment. There were no comments. **Motion failed unanimously.**

Ms. Sherman read item 5.b. **Mr. Colbath moved, seconded by Ms. Duane that 5.b. not apply.** Mr. Irving pointed out that 5.a. was not met, it failed. **Ms. Duane withdrew her second and Mr. Colbath withdrew the motion.** Mr. Irving questioned Attorney Malia if we need to address 5.b. Attorney Malia replied in the affirmative and stated they should go ahead and see if satisfied. **Mr. Colbath made a motion, seconded by Ms. Duane, that if the criteria in subparagraph a are not established, an unnecessary hardship will be deemed to exist, if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.** Ms. Sherman asked for Board comment. Ms. Sherman stated she would vote no because the property surrounding this property are the same. There is no special condition for this property. All Agreed. **Motion failed unanimously.**

Ms. Sherman read item 6. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense.** Ms. Sherman asked for Board comment. Mr. Colbath advised he would vote no as he believes it will result in increased flood height and public safety issues. **Motion failed 1-4-0 with Mr. Chalmers voting in the affirmative and Mses. Duane and Sherman and Messrs Hylen and Colbath voting in the negative.**

Ms. Sherman read item 7. **Mr. Colbath made a motion, seconded by Ms. Duane, that the requested variance is for activity within the designated regulatory floodway, no increase in flood levels during the base flood discharge will result.** Ms. Sherman asked for Board comment. Mr. Colbath advised he will vote no as he believes there will be increased flood level if structures are allowed in the floodway. **Motion carried 3-2-0 with Messrs Chalmers and Hylen and Ms. Duane in the affirmative and Mr. Colbath and Ms. Sherman in the negative.**

Ms. Sherman read item 8. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment. Mr. Hylen asked for an explanation from FEMA. Ivy Frances stated that what FEMA is saying is that in order to allow something in there or what is the least thing you

can have in there, which in a floodway does not exist. In a floodway it is not allowable. There is the no-rise criteria. Mr. Hylen next questioned relief from what? Ms. Frances advised from the flood hazard –it is in a floodway. Ms. Sherman stated when in a floodway there should be nothing to impede or raise the floodway. Relief is to the river not the property owner. Ms. Frances stated in a floodplain. Ms. Frances next stated that in the floodway anything you do in the floodway causes a rise or you have to show it won't, which is impossible. **Motion carried 3-2-0 with Messrs. Chalmers and Hylen and Ms. Duane voting in the affirmative and Mr. Colbath and Ms. Sherman voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that based on the forgoing findings of fact, the variance from §147.13.14 of the Town of Conway Zoning Ordinance to allow existing structures to remain in the Floodplain Conservation District be granted. The motion failed 0-5-0.

Ms. Sherman advised the Applicant the variance has been turned down and they have 30 days to appeal the decision. Ms. Sherman reviewed the applicant went forward with this hearing and agreed to proceed after asked about the paper notice earlier in the meeting. Ms. Sherman advised that if we deny the appeal, it is applicants opportunity to take this to court if they so choose. The Applicant acknowledged he understood and stated “so be it”.

A public hearing was opened at 8:25 pm to consider a **VARIANCE** requested by **PATRICE AND HOLLY ROULEAU** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** at 372 Transvale Road, Conway (PID 251-58). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Thursday, November 3, 2011.

Patrice and Holly Rouleau appeared before the Board. Ms. Sherman stated this request is to permit a shed on the property to remain. Ms. Sherman questioned if the applicants are in the same area as the previous applicant. The applicants responded in the affirmative.

The Applicant, Ms. Rouleau, next asked for a continuance due to the paper notice. Ms. Sherman advised this could be added to the January 18, 2012 agenda. The Applicants agreed. **Mr. Colbath moved, seconded by Ms. Duane, that the hearing for Patrice and Holly Rouleau be continued until the 18th of January 2012 at 7:30 p.m. The motion carried unanimously.**

A public hearing was opened at 8:27 pm to consider a **VARIANCE** requested by **JEFFREY AND MICHELLE KNOWLES** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** at 128 E Road, Conway (PID 251-61). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Thursday, November 3, 2011.

Jeffrey and Michelle Knowles appeared before the Board. Ms. Sherman questioned if the Knowles' have documentation that structures on their property had been there before 1979. Ms.

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Knowles responded in the negative and advised she purchased the property in 2007. Ms. Knowles further advised she was told by the previous owner that it was built in 1979. Ms. Sherman stated that in reviewing the 1981 assessing records it showed a small shed with a \$100 value. This was two years after the enactment of the ordinance. Also, the record shows in 1984 a slab with a canopy. Ms. Sherman reviewed the applicants stated the shed was there in 1979 however, the physical record shows 1981. Ms. Knowles asked about campgrounds. Ms. Sherman advised there is no provision in the zoning ordinance for new campgrounds. Ms. Knowles stated they were told all was grandfathered when they bought the property. They have put in electrical to standards and is waterproofed, etc. Ms. Knowles next stated she understands they are in the floodplain, but just like Katrina, feels they can rebuild as it was an act of Mother Nature and now they are being punished. Ms. Sherman reviewed the ordinance was enacted in 1979 and anything done after 1979 was not permitted although it may have been represented to you as being legal when the property was purchased from the former owner. Ms. Knowles asked about being assessed for the structures. Ms. Schofield advised the Town assesses what is there on the property. It is not up to the Assessing Department to say what is legal. If it is there, then we (the town) assess it and the property owner will pay taxes for a shed, footprint, slab, etc, according to state law. Ms. Knowles stated the town is taking money for illegal structures and she wants her money back. Ms. Sherman reviewed again that the records show the structure was not there before the ordinance was enacted. Mr. Colbath stated that Ms. Knowles was not told the truth by the person who sold her the property. Ms. Knowles next stated that she talked to someone from town who said whatever is there is okay and you can't build more but now they are being penalized. Ms. Sherman stated the employees have been here since 1979, Tom Irving, David Pandora and Jim Yeager and this would not have been what she was told. Ms. Knowles stated that she was told that she was grandfathered.

Attorney Malia stated there are two separate issues – if someone has an argument they are grandfathered when the town enacted the ordinance and if Tom Irving or Jim Yeager disagree with them then those folks have been instructed to appeal the administrative decision. The Applicants before us today have not filed for an appeal of an administrative decision, they are asking for a variance. Ms. Knowles stated that this is what they were told to do when her husband called the Town office.

Mr. Malia next stated that as a result of Tropical Storm Irene there are many structures that have come to the attention of the town and the town is now looking into this matter. Susan Blaney stated that she can attest under oath that before they owned it, she was under canopy in 1985. Ms. Sherman reviewed again that this was not done before 1979.

There were no further public comments and the public hearing closed at 8:39 p.m.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms Duane, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment. Mr. Chalmers stated he will vote no because it is contrary to public interest to allow the structure in the floodway. **Motion failed unanimously.**

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Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms Duane, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment. Ms. Sherman stated the purpose of the ordinance was to keep structures out of the floodway. **Motion failed unanimously .**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that substantial justice is done.** Ms. Sherman asked for Board comment. Mr. Colbath stated that substantial justice would not be done because the benefit to the applicant is outweighed by the harm to the community. **Motion carried 1-3-0 with Mr. Hylen voting in the affirmative and Mses. Duane and Sherman and Messrs Colbath and Chalmers voting in the negative.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms Duane, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment. Ms. Sherman stated she will vote no based on the fact that FEMA may interfere with flood insurance rates. **Motion carried 1-4-0 with Mr. Colbath voting in the affirmative and Mses. Duane and Sherman and Messrs. Chalmers and Hylen voting in the negative.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Ms Duane, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** Ms. Sherman asked for Board comment. Ms. Sherman stated she will vote no as this particular property has no special condition that separates it from other properties in the area. **Motion failed unanimously.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Ms. Duane, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment. Ms. Sherman stated that no use in floodway of structures is reasonable. **Motion failed 1-4-0 with Mr. Hylen voting in the affirmative and affirmative and Mses. Duane and Sherman and Messrs. Chalmers and Colbath voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Ms. Sherman asked for Board comment. There were no comments. **Motion failed unanimously.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Ms. Duane, that if the criteria is subparagraph a are not established, an unnecessary hardship will be deemed to exist, if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.** Ms. Sherman asked for Board comment. There were no comments **Motion failed unanimously.**

Ms. Sherman read item 6. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance will not result in increased flood heights, additional threats to public safety, or**

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extraordinary public expense. Ms. Sherman asked for Board comment. There were no comments. **Motion failed unanimously.**

Ms. Sherman read item 7. **Mr. Colbath made a motion, seconded by Ms. Duane, that the requested variance is for activity within the designated regulatory floodway, no increase in flood levels during the base flood discharge will result.** Ms. Sherman asked for Board comment. There were no comments. **Motion failed 2-3-0 with Mr. Hylen and Ms. Duane voting in the affirmative and Ms. Sherman and Messrs. Chalmers and Colbath voting in the negative.**

Ms. Sherman read item 8. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment. There were no comments. **Motion failed 2-3-0 with Messrs. Hylen and Chalmers voting in the affirmative and Mses. Duane and Sherman and Mr. Colbath voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that based on the forgoing findings of fact, the variance from §147.13.14 of the Town of Conway Zoning Ordinance to allow existing structures to remain in the Floodplain Conservation District be granted. The motion failed unanimously.

Ms. Sherman explained to the applicant the variance has not been granted and they have 30 days to appeal. If you don't have the rehearing granted then you are able to take this to court.

A public hearing was opened at 8:45 pm to consider a **VARIANCE** requested by **PAUL AND TRICIA PELLERIN** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** at 129 E Road, Conway (PID 251-68). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Thursday, November 3, 2011.

Paul and Tricia Pellerin appeared before the Board. Ms. Sherman questioned if they had heard about the notice in the paper as discussed earlier in the meeting. The applicants responded in the affirmative. Ms. Sherman questioned if they are waiving their right to continue this matter to another meeting. The applicants responded in the affirmative.

Mr. Pellerin stated the only thing he can say is that the Town of Conway can't say they didn't know the structures were there. He has a tax card stating there were structures on the property in 1968. Ms. Pellerin advised they have a pavilion and there is also a trailer but this wasn't used as living space, only storage. They bring a travel trailer with them when they come to their property. Ms. Pellerin next stated the only part on their property in the floodplain is the slab of the pavilion. Ms. Pellerin further advised they are right on the river. Mr. Colbath questioned if they are in the floodway and Ms. Duane responded in the affirmative. Mr. Colbath stated in looking at the tax records, it says it was a vacant lot. Mr. Pellerin stated this is not the record he has and presented a copy of his record to the Board for review. Mr. Pellerin next stated that he

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has been going to the property since he was six years old. To not have these structures on the property would make it worthless and there would be no way to get out of the rain. Mr. Pellerin next stated they know it floods and the structures have lasted through this and the last flood. Mr. Pellerin stated he does not feel the structures are making water heights higher. Ms. Pellerin next stated they are not here to ask for grandfathering as they were told their option was to ask for a variance. Mr. Pellerin next stated that he feels it seems that the Board had the intention of saying no to all requests. Ms. Sherman explained that if we (the Board) believe we are upholding the ordinance, this is our job. Mr. Pellerin next questioned then why didn't they do this five years ago and, also, they have been paying taxes to the town for many years on this property. Ms. Pellerin next stated that on the tax card it states they have a non conforming structure on the property. Assistant Assessor, Dale Scholfield, stated the records go back to 1977. In 1977 they had a revaluation so we know what was on the property in 1977. The next revaluation was in 1994 and so we know what was on the property in 1994. In between we had no reason to know what was on the property. Also, the revaluation company does not know what the town ordinances are –they don't know non conforming or conforming. Ms. Schofield stated that now if she sees a property with a shed with no permit she sends a memo to David Pandora. Mr. Sires stated in essence we haven't treated Transvale different than any other part of Town. We don't have the authority to do residential inspections and we can't go to properties and do blanket inspections. If the same thing came up in another area of Town, we would be doing the same. We are not about inspecting people's private property and unless someone complains then we go out to the property. Ivy Frances advised she is the Branch Chief for the Regional Office of FEMA in Boston. Ms. Frances explained that FEMA does do community assistance visits with Towns and this happens when there are events. FEMA also asks for permits obtained in the Floodplain or Floodway. If there are no permits in the floodway or floodplain, they tell the Town they have to go to the property owners. The property owners need to show they are allowed and are given a certain amount of time before the Town is suspended from the National Flood Insurance Program. Ms. Frances next stated there is no evidence that the town can reveal to FEMA that says that these structures don't cause a rise in the floodplain and this is very germane to whether or not things are safe in the floodway and whether it is causing a rise during the base flood elevation flood event for other structures and so that is what we look for. When it comes to variances, we are very strict on this issue and the Town has to show just cause for giving a variance. Also, if there is no building permit this is not just cause for a variance. Attorney Malia stated he understands that the Applicant has had structures for some time and just because the Town didn't send out a notice five years ago doesn't preclude them from doing so now. Further, he does not think that this Board was predisposed to saying no as the Applicant indicated earlier. Attorney Malia next stated that reference was made earlier to 1968 and that the Town told people if they can show evidence of grandfathering then they can come to the Board. Mr. Irving advised that people were told they had either option and this Applicant applied for a variance.

Ms. Pellerin next stated that still no one has answered her on the tax card issue. They are trying to do what the Town is asking them to do. Mr. Chalmers asked what was on the site in 1968. Mr. Pellerin stated he was born in 1977 and does not know what was on the site in 1968. Mr. Colbath next read information from the tax card. Ms. Schofield explained that RN1 is a code for a single wide mobile home and RN2 is for a doublewide. If there was a home there in 1968 it

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must have been moved thereafter because when the revaluation was done in 1977-78 it says that this was a vacant lot. It was assessed as a vacant lot in 1978. In 1994 we went back for another revaluation. Ms. Sherman asked Mr. Pellerin if the same structure from 1968 is still there. Mr. Pellerin stated that he doesn't know. Ms. Sherman questioned if a different structure was put there after 1979. Mr. Pellerin stated that he can't sit here and lie and he doesn't know. Mr. Irving advised that if the applicant is going to seek grandfathered status they can seek an appeal of the administrative decision, but then they still have the burden of proof. Ms. Schofield next referred back to the information the Applicant was pointing to on the tax card and advised that this means the property is getting a 20% discount because it is on a dirt road. The non conforming language on the card is language used for software because the property is on a dirt road and has nothing to do with structures, etc., on the property.

Ms. Pellerin next questioned if their next step is to appeal the administrative decision. Ms. Sherman advised that if this doesn't pass today then they can take their proof to the Town and they will make a decision. If they are denied then they can come back to this Board to appeal the administrative decision and this Board will judge if they were right in denying them or not. Ms. Sherman advised they will need to have sufficient proof that the structures were there prior to 1979. Ms. Pellerin next questioned if they can not prove this is it then their financial cost to remove the structures. Mr. Irving replied in the affirmative. Mr. Pellerin stated he believes they are being treated unfairly because of something the town didn't do. Ms. Sherman pointed out that the issue is between buyer and seller. Ms. Duane stated that everyone feels for this situation and everyone is saying it is the town. The situation is that the structures appeared without building permits. If they went through the process they would have found out if they were permitted or not and then we wouldn't be here now. Anywhere you go you have to get a building permit, whether in New Hampshire, Massachusetts or elsewhere. It is hard to listen to the Town being blamed as it is not their fault.

Andy Chalmers next stated in looking at the property record card he sees it states manufactured housing and year built 1968. Ms. Duane pointed out it also states the home left after that. Ms. Schofield stated that unfortunately for the year built the revaluation company guesstimates the year built on the home if it is an existing home. If the owner is home they will ask when the home was built. If not they, though their expertise, say when the home was built. Also, even if built in 1968 it doesn't mean it was on the property in 1968. People are always moving mobile homes. The year built is irrelevant because there was nothing on the property in 1978.

Mr. Pellerin stated his guesstimate is that it was there in 1968. If the Assessing Department can guesstimate they he can as well. Ms. Sherman again explained they will then need to prove it is grandfathered.

The public hearing was closed at 9:25 pm.

Ms. Sherman read item 1. **Mr. Colbath. made a motion, seconded by Ms. Duane, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment. There were no comments. **Motion failed unanimously.**

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Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Duane, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment. Ms. Sherman commented this is contrary to public interest because all of the property is built in the floodway where structures are not allowed. There were no comments. **Motion failed unanimously.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that substantial justice is done.** Ms. Sherman asked for Board comment. Ms. Sherman stated by granting the variance substantial justice wouldn't be done because the benefit to the applicant was outweighed by the harm to the community. **Motion failed 2-3-0 with Ms. Duane and Mr. Hylen voting in the affirmative and Messrs. Colbath and Chalmers and Ms. Sherman voting in the negative.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Duane, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment. Ms. Sherman commented that based on the properties it does diminish the insurance program and will be detrimental to all properties in the floodplain in town. **Motion failed 1-4-0 with Mr. Colbath voting in the affirmative and Messrs. Chalmers and Hylen and Ms. Duane and Sherman voting in the negative.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Ms. Duane, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** Ms. Sherman asked for Board comment. Ms. Sherman stated this property is basically the same as any other property in the area. **Motion failed unanimously.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Ms. Duane, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment. Ms. Sherman stated the use is not reasonable to have a structure built in the floodway. **Motion failed 1-4-0 with Mr. Hylen voting in the affirmative and Messrs. Chalmers and Colbath and Ms. Duane and Sherman voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Ms. Sherman asked for Board comment. There were no comments. **Motion failed unanimously.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Ms. Duane, that if the criteria is subparagraph a are not established, an unnecessary hardship will be deemed to exist, if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.** Ms. Sherman asked for Board comment. Mr. Colbath stated there are no specific conditions that distinguish it from other properties in the area. **Motion failed unanimously.**

Ms. Sherman read item 6. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance will not result in increased flood heights, additional threats to public safety, or**

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extraordinary public expense. Ms. Sherman asked for Board comment. Mr. Colbath stated he would vote no because it will result in an increase in flood height . **Motion failed unanimously.**

Ms. Sherman read item 7. **Mr. Colbath made a motion, seconded by Ms. Duane, that the requested variance is for activity within the designated regulatory floodway, no increase in flood levels during the base flood discharge will result.** Ms. Sherman asked for Board comment. Ms. Sherman stated the structure in floodway will increase flood levels. **Motion failed 1-4-0 with Mr. Hylen voting in the affirmative and Messrs. Chalmers and Colbath and Mses. Duane and Sherman voting in the negative.**

Ms. Sherman read item 8. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment. There were none. **Motion failed 2-3-0 with Messrs Chalmers and Hylen voting in the affirmative and Mr. Colbath and Mses. Duane and Sherman voting in the negative.**

Mr. Colbath made a motion, seconded by Ms, Duane, that, based on the forgoing findings of fact, the variance from §147.13.14 of the Town of Conway Zoning Ordinance to allow existing structures to remain in the Floodplain Conservation District be granted. The motion failed unanimously.

Ms. Sherman explained the application is denied. The applicant can ask for a determination if they are grandfathered. Mr. Pellerin asked what is proof. Ms. Sherman stated the town wants to know if the existing structures were on the property prior to 1979. Attorney Malia advised that photos and affidavits may help. Mr. Sires cautioned this is not always the strongest evidence however. Attorney Malia further added any newspapers articles as well; however, there is not a set formula or checklist. Whatever you can produce, bring it forward to staff and if staff denies the request then it can be brought to the Board.

Ms. Pellerin next requested a copy of the information the Board has for this meeting. Mr. Irving advised he can scan the information and email it tomorrow. Ms. Pellerin agreed and advised she would call the town office tomorrow.

Mr. Morse questioned when the fines start. Mr. Sires stated this is not set yet. Mr. Morse stated he can't get into property. Mr. Sires advised Mr. Morse to contact staff as each property is different and circumstances vary.

This portion of the meeting concluded at 9:32 p.m.

2012 ZONING BOARD OF ADJUSTMENT DATES

Ms. Duane made a motion, seconded by Mr. Colbath, to approve the 2012 Zoning Board of Adjustment meeting dates. Motion carried unanimously.

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The Board discussed the next meeting date. It was agreed that the next meeting would be held on December 14, 2011.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Ms. Duane, to approve the Minutes of September 21, 2011 as written. Motion carried unanimously.

BOARD DISCUSSION

The Board next held a general discussion with Ivy Frances of FEMA and Susan Slack of EOC regarding 6, 7 and 8 of the criteria.

Mr. Colbath questioned how many properties in the floodway. Mr. Sires advised there are 60 or so properties. Mr. Colbath questioned how many are grandfathered at this time. Mr. Irving advised maybe a dozen or so and some are just sheds. Mr. Irving further advised that over 70 violation notices have been sent out.

Ms. Duane questioned how many applications we will do in a night. Mr. Irving advised there are eight scheduled for the next meeting. Mr. Irving advised we can only defer for so long as well and cautioned the Board not to defer people for six or seven months down the road. Ms. Duane stated that this Board meets once a month now and with the number of violations issued we could be hearing matters for 8 or 9 months. Ms. Duane suggested meeting more than once per month. Mr. Irving pointed out there are administrative deadlines, etc. to consider.

Meeting adjourned at 10:08 pm.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Karen Hallowell", with a long horizontal line extending to the right.

Karen Hallowell
Executive Secretary